

**American Red Cross Blood Services Division and
Everett Sanders.** Case 10-CA-27863

March 17, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On December 23, 1994, Administrative Law Judge Robert C. Batson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief, and has decided to affirm the judge's rulings,¹ findings, and conclusions as modified² and to adopt the judge's recommended Order as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, American Red Cross Blood Services Division, Atlanta, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

“(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.”

2. Insert the following as paragraphs 2(d) and (e).

“(d) Remove from its files any reference to the unlawful discharge of Everett Sanders, and notify him in writing that this has been done and that the discharge will not be held against him in any way.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We substitute the following for the judge's Conclusion of Law 3: The conduct of Respondent found in 2 above is an unfair labor practice affecting commerce within the meaning of Sec. 8(a)(1) and Sec. 2(6) and (7) of the Act.

³ We shall correct further inadvertent errors the judge made in his recommended Order and notice by substituting a narrow injunctive provision for the broad provision included in the judge's recommended Order and by including an expunction remedy and the standard provision requiring the Respondent to notify the Regional Director within 20 days from the date of the Order what steps it has taken to comply.

“(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.”

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through any representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge our employees because they have engaged in union or other protected concerted activities for the purpose of collective bargaining or other mutual aid or protection, or fail and refuse to reinstate them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer our employee Everett Sanders immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent one, without prejudice to his seniority or any other rights or privileges previously enjoyed by him and make him whole for any loss of pay he may have suffered as a result of the discharge.

WE WILL remove from our files any reference to the unlawful discharge of Everett Sanders and notify him in writing that this has been done and that the discharge will not be held against him in any way.

AMERICAN RED CROSS BLOOD
SERVICES DIVISION

J. Howard Trimble, Esq.,¹ for the General Counsel.
M. Jefferson Starling III and *H. Lane Dennard Jr., Esqs.*
(*King & Spalding*), of Atlanta, Georgia, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT C. BATSON, Administrative Law Judge. This case was tried before me on November 14,² 1994,³ at Atlanta, Georgia. The charge giving rise to the complaint herein was filed on August 19 by Everett Sanders, an individual. The Regional Director for Region 10 (Atlanta, Georgia) issued a complaint and notice of hearing on October 3, alleging that American Red Cross Blood Services Division (Respondent or Employer)⁴ had violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging its employee Everett Sanders.

In its duly filed answer to the complaint the Respondent admits all procedural allegations, but denies that its discharge of Sanders violated the Act as alleged.

I find that the General Counsel has established by a preponderance of the credible evidence that Respondent has violated the Act as alleged.

All parties were represented and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Respondent filed a brief. The General Counsel waived the filing of a brief and made a closing oral argument. Upon consideration of the entire record and the brief, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, American Red Cross Blood Services Division is, and has been at all times material herein, a non-profit Washington, D.C. corporation, with an office and place of business located at 1925 Monroe Drive, Atlanta, Georgia, where it is engaged in the collection, processing, storage, and distribution of blood, blood components, and blood products to government, nonprofit, and proprietary hospitals in the State of Georgia. During the past calendar year, which period is representative of all times material herein, had a gross volume of business from such operations valued in excess of \$250,000. During the same representative period it purchased and received at its Georgia facilities goods valued in excess of \$50,000 directly from suppliers located outside the State of Georgia.

Respondent admits, the evidence establishes, and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent discharged its employee, Everett Sanders, on March 14, for his alleged insubordination toward his de-

partment director, Trudy Brennan, during a step-2 grievance meeting on March 9, concerning a grievance Sanders had filed alleging harassment by his immediate supervisor, James Matthews.

The Aluminum, Brick and Glass Workers International Union, Local Union No. 254, AFL-CIO, CLC is the certified collective-bargaining representative in a unit of:

All Mobile Unit Driver Assistants (MUDA), Blood Collection Assistants (BCA), Blood Collection Technicians I (BCT I), Blood Collection Technicians II (BCT II), and Licensed Practical Nurses (LPN), but excluding all office clerical employees, professional employees, Registered Nurses, guards, Head Nurses, Assistant Head Nurses and all other supervisors as defined in the Act.

This unit is confined to only those employees employed at its facility located at 1925 Monroe Drive, Atlanta, Georgia. (R. Exh. 1.) The current agreement expires March 1, 1995.

Sanders had been employed by the Respondent since October 1992 as a mobile unit driver assistant (MUDA). His duties consisted of driving trucks, setting up drive, transporting blood, and recording some data about the blood. The vehicles operated by Sanders are sometimes called "blood-mobiles."⁵

Most of the facts giving rise to Sanders' termination are not in dispute. Sanders had filed a grievance against his immediate supervisor, James Matthews, alleging harassment. No resolution of the grievance having been achieved at the first step of the grievance procedure, Sanders' steward, Jack Pyant, had made an appointment with Director of Nursing Trudy Brennan for 1 p.m., March 9, in Brennan's office for a step 2 meeting.

The substance of what occurred shortly after 1 p.m., March 9, in or near Trudy Brennan's office as presented by the General Counsel by the testimony of Jack Pyant and Everett Sanders will be addressed first. Sanders met Pyant in an area outside Brennan's office shortly before 1 p.m. Ten to twenty minutes after 1 o'clock, Brennan "showed up" and Pyant advised her they were there by appointment for the step-2 grievance filed by Sanders. Brennan responded to the affect that they did not have an appointment at that time Pyant reiterated that they did. Brennan again said they did not.

According to Sanders, at this point he turned to Pyant and said "Jack, you know I'm due at work at 1:45. I'm on probation." Sanders continued "If you say the meeting is at 1:00 and Brennan says there's not a meeting with us and its twenty-five minutes past 1:00, then someone don't know what's going on with the situation." (Tr. 36-37.) Sanders turned to leave to clock in and as he past through a secretarial area someone told him, "Everett they're calling you." Sanders turned and apparently walked back toward Pyant and Brennan when Brennan asked, in an angry voice, "What did you say?" Sanders told Brennan he was talking to Pyant and not to her. She repeated the question. Sanders told her that he had said that if Pyant said they had an appointment and she said they didn't, "Someone don't know what's going on with the situation."

⁵ For a more detailed description of the duties of this classification see R. Exh. 4.

¹ Herein called the General Counsel or Government.

² Certain errors in the transcript have been noted and corrected.

³ All dates herein are 1994 unless otherwise indicated.

⁴ The name of the Respondent appears as amended at trial. The complaint and all pleadings and underlying documents named the Respondent as "American Red Cross." At trial, counsel for the Respondent averred that the correct legal name of Respondent was "American Red Cross Blood Services Division." I granted counsel for the General Counsel's motion to amend the name of the Respondent as shown in the complaint and all previously filed pleadings and underlying documents to reflect the correct legal name. See Tr. 60.

were there, Sanders became very calm and businesslike, answering questions, and giving information.

After Sanders and Pyant departed, Brennan left messages for Director of Human Resources Adair Maller and Chief Operating Officer Beth Greenberg, to whom Brennan reports. That same date she also wrote a memorandum to Beth Greenberg. (G.C. Exh. 2.)

What really happened on March 9, in or near Brennan's office concerning Pyant and Sanders' attempt to have a step 2-grievance meeting with Brennan probably lies somewhere between the slanted version given by Brennan and Matthews and that given by Sanders and Pyant. I find that Brennan dropped by her office at probably 1:10 to 1:15 and was surprised to see Pyant and Sanders there, she having honestly forgotten the appointment, and had honestly, but mistakenly scheduled it on her calendar for a week later. I also find that she initially took issue with, or denied, that their grievance meeting was scheduled for that date. This is what provoked Sanders' initial outburst made to Pyant, probably very angrily to the effect that if Pyant said they had an appointment and Brennan said they didn't, "Someone didn't know what was going on with the situation." He then grabbed his satchel and walked away, call it stormed away if you wish, to clock in. Although the statement was addressed to Pyant, Brennan clearly heard it.

It is noted here that Sanders has a rather deep and gravely voice which tends to be heard further away than most voices and it was my impression as he testified that the man probably could not speak in a whisper if his life depended on it. Here, it was not his life, but his voice may have cost him his job. Had Brennan been only 1 or 2 minutes late, I doubt that Sanders would have noticed. Also, if she had immediately, realizing that she had made a mistake, said, as she testified, "We'll have to fix that," Sanders would have had no reason and would not have made the statement that someone didn't know what they were doing.

Although Brennan had clearly heard Sanders' statement directed toward Pyant, she called him back as he "stormed out" and to all intents and purposes forced him to repeat it. I find that Brennan realized that it was, indeed, she who had made the mistake about the date, took Sanders' statement that someone didn't know what they were doing in that situation personally and was greatly offended by it. Had it been Pyant who had erred about the date of the appointment he would have been the one who didn't know what he was doing in that situation and she would probably have laughed it off, and perhaps chided Pyant for his error. I believe that Brennan was very competent in her job, both as a registered nurse and as a supervisor over about 225 employees, and that she made very few mistakes. Being the perfectionist she was, she was more angry with herself than with Sanders' attitude and statements.

I further find that Sanders, during this event, did not tell Brennan that she was "incompetent." I find the statement admitted by Sanders is the equivalent of saying one is incompetent in a particular situation. Therefore, for purposes of this decision it would make no difference had he used the word "incompetent." This finding is supported by the memorandum she wrote to chief operating officer, Beth Greenberg, dated March 9, in which the only statement attributed to Sanders was "You don't even know what you're doing." (G.C. Exh. 2.) While she goes on to describe the

angry look on Sanders' face, and that she told him his conduct was inappropriate and unacceptable behavior and admitted that she had Sanders repeat to Jim Matthews the fact that I didn't "In this case know what I was doing." She goes on to state that Jim Matthews later described Sanders' manner as "truculent," "aggressive," and that he was "appalled" at his attitude and "found it to be totally disrespectful." She went on to tell Greenberg that Ruth and Beth Kline had seen Sanders come into her office about 1:05 and said he had looked "tense, murderous, hostile and angry."⁹

Brennan hand-wrote another memo to Beth Greenberg. This memo is not dated, but in handwriting different from Brennan at the top of the page is "Mar. 94." I gather from Brennan's testimony this memo was written at some point after March 11, when the decision was made to terminate Sanders. In this memo, for the first time she states, "He continued to tell me I was incompetent in an angry, tense, loud, and intimidating manner."

In a memo to file written by Jim Matthews with respect to the termination interview with Sanders wherein he relates that Sanders again denied that he had called Brennan incompetent. He apologized for any problems he caused, but insisted that he did not intend to be disrespectful. (R. Exh. 7.) Indeed, it appears that in the interim, between March 9 and March 14, Sanders had telephoned both Brennan and Adair Maller and apologized for the way Brennan had taken remarks concerning his opinion that someone didn't know what they were doing in the course of processing his grievance.

In short, I find that Sanders expressed more anger and aggressiveness during this March event than suggested by his trial testimony. However, his demeanor was far less aggressive and intimidating than indicated by the testimony of Brennan and Matthews, and in the memos obtained from others concerning the incident. I find that in this instance Sanders was endeavoring to process his grievance pursuant to the contract by appointment with Brennan and that his conduct was not so flagrant, egregious, or so opprobrious as to place him beyond the protection of the Act.

The Respondent argues that at the time Sanders was insubordinate and disrespectful to Brennan, director of the department in which Sanders worked, Sanders' conduct was not protected in that Brennan had not declared that they were discussing the grievance. The Respondent contends that Sanders' conduct during the grievance meeting was entirely proper and had no bearing on the conduct for which he was discharged.¹⁰

This contention is without merit. The single purpose for which Sanders and Pyant were waiting in the reception area outside Brennan's office was to meet the preagreed-on 1 p.m. date for a step-2 grievance meeting. The fact that Brennan took issue with them about the appointment provoked the en-

⁹Neither Ruth nor Beth Kline testified at trial. Accordingly, no weight is given these subjective observations and description of Sanders' appearance as he entered the office.

¹⁰The Respondent continues to argue that Sanders' discharge was in accordance with its progressive disciplinary policy and that he was already on probation at the time. Brennan testified that he would have been discharged for this conduct without regard to his probationary status in accordance with Respondent's disciplinary action schedule (R. Exh. 3), which provides that termination is the discipline for a first offense of insubordination.

tire episode. All of Sanders' comments concerned some one didn't know what was going on "with the situation." This statement clearly refers to his step-2 grievance meeting.

Container Corp. of America, 255 NLRB 1404 (1991), cited by Respondent, is clearly distinguishable. There, after the grievance meeting was over and the grievant had left the office, the steward told the supervisor he was "sick of this shit" and wanted to continue the meeting. After the supervisor's third order to the steward to return to work, which the steward defied, he was suspended. However, he was not discharged. The Board held that the steward's refusal to return to work after three orders to do so was not protected and thus sustained the suspension. In the instant case, Sanders did not defy an order to return to work. Indeed, at the very beginning of the encounter, when Brennan disputed the fact that they had an appointment, Sanders started to leave to clock in and was ordered by Brennan to return.

Similarly, in *Calmor Combining Co.*, 184 NLRB 914 (1970), the plant manager disciplined, not discharged, a shop steward when after a grievance meeting the steward returned to work and began shouting something about the grievance. The plant manager asked him to stop shouting and was told: "You can't shut me up, I'll shout all I want to." He again asked him to be quiet, but the steward said, "I don't give a damn what you say, I'll shout all I want to, and if you don't like it, tell me to leave." The Board found the steward's continued intransigence was not a part of the grievance discussion and his refusal to obey a reasonable and lawful order not related to the grievance was not protected.

In the case here, Sanders was not told by Brennan to stop making remarks about anyone being incompetent, but merely that his conduct was inappropriate. Sanders did not refuse to obey any instructions or orders given him by Brennan.

In the alternative the Respondent contends that even if Sanders was presenting a grievance his conduct was not protected. I find that Sanders was engaged in the formal grievance process and thus in protected activity. For the reasons set forth below, I find that his conduct was not so egregious or flagrant to warrant any disciplinary action by Respondent.

In *American Telephone & Telegraph Co.*, 211 NLRB 782 (1974), an employee, who was also a union agent was given a written warning of possible "very severe disciplinary action" for the manner in which she conducted herself while engaged in certain union activity. The judge found that the employee was not engaged in a union matter such as contract negotiations or grievance settlement, but only in a "peripheral procedural matter totally devoid of substance" and could see no reason for what he considered to be her improper conduct. The Board reversed. The employee, Walden, in her capacity as a union agent had requested information relevant to a change in operations affecting certain employees. She was not satisfied with the information received. She complained to the district operations manager that the information was inadequate.¹¹

¹¹ The conduct in which Walden engaged was:

Walden, in an increasingly louder voice, referred to the information sent her as garbage, stated that the type of information she wanted had been given her on other occasions, and claimed that Beckett and his superior, Nichols, should be able to interpret her requests. Then in response to Beckett's statement that the information supplied was that asked for, she shouted she was not there to play games and finally—and still shouting—she made

The Board found, contrary to the judge, that Walden's conduct "was the very means—albeit, we agree, a rude one—by which she presented her complaint and thus was part of the res gestae of the protected activity."

I find that Sanders' conduct complained of here, and for which he was terminated, is clearly protected by the Act. Pyant and Sanders had a 1 p.m. appointment for a step-2 grievance meeting with Brennan at her office. All conduct occurring thereafter 1 p.m. was inextricably part and parcel of the grievance procedure. The protection of the Act in this situation is triggered at the time and place scheduled, and not, as contended by the Respondent, until Brennan reluctantly proceeded to discuss the grievance.

The applicable standard governing employer conduct when dealing with employees during collective bargaining was set forth long ago in *Bettcher Mfg. Corp.*, 76 NLRB 526, 527 (1948), there the Board stated:

A frank, and not always complimentary, exchange of views must be expected and permitted the negotiators if collective bargaining is to be natural rather than stilted. The negotiators must be free not only to put forth demands and countermands, but also to debate and challenge the statements of one another without censorship, even if, in the course of debate, the veracity of one of the participants occasionally is brought into question. If an employer were free to discharge an individual employee because he resented a statement made by that employee during a bargaining conference, either one of two undesirable results would follow: collective bargaining would cease to be between equals (an employee having no parallel method or retaliation), or employees would hesitate ever to participate personally in bargaining negotiations, leaving such matters entirely to their representatives.

The Board has consistently applied the same standard to the grievance machinery in a collective-bargaining agreement. See *Hawaiian Hauling Service*, 219 NLRB 765 (1975), where the Board refused to defer to an arbitrator's upholding the discharge of an employee for angrily calling the respondent's vice president and general manager "a liar" during the processing of a grievance. See also *Union Fork & Hoe Co.*, 241 NLRB 907 (1979), where the Board refused to defer to an arbitrator's finding upholding the discharge of a grievant, as a union steward, because as a steward the arbitrator held him to a higher degree of proper conduct within the plant than other employees. There the grievant, who was also a steward, took his time sheet from the superintendent clipboard and refused to return it.

In *Syn-Tech Windows Systems*, 294 NLRB 791 (1989), the Board found the discharge of a union steward for his conduct during a grievance meeting to be a violation of the Act. During the course of a grievance meeting with the respondent's officer, Mark Wisner, Garcia, the employee discharged, refused to leave Wisner's office upon request after Wisner re-

some comment concerning Beckett's lack of intelligence. At several points Beckett interjected to warn Walden that the meeting would end if she did not improve her tone and manner and with her comment concerning his lack of intelligence Beckett stated the meeting was ended. Walden left. The whole meeting had lasted only 3 to 5 minutes.

ceived a disturbing telephone call. Garcia then pointed his finger angrily at Wisner and threatened him with an unspecified "problem" if the grievances were not remedied. Garcia's parting remark was to the effect that the employees might look for a different union and wondered if that would cause problems for Wisner.

In the case at bar I find that Sanders' conduct during the course of a grievance meeting is not sufficiently so flagrantly egregious or so opprobrious as to warrant his discharge, or indeed any lesser discipline. I am convinced that the only statement made by Sanders was to the effect that someone didn't know what was going on with the situation of processing his grievance. It is reasonable that it would appear so to him in that Brennan initially denied that she had made an appointment for that date. He repeated that statement several times in a loud and probably angry voice which might well have been heard outside Brennan's office. I have previously commented on the volume, depth, and carrying tone of Sanders' voice. That he was angry and feared that he was being "set up" is not in doubt. I so find.

Because Brennan added statements attributed to Sanders at every step, statements not attributed to him in her first memo to Beth Greenberg, dated March 9, I find that Brennan convinced herself that Sanders' conduct had been much more egregious than it, in fact, had been. However, even if the totality of the testimony at trial given by Brennan and Matthews were credited, Sanders was still engaged in protected activity, and thus protected by the Act.

Accordingly, I find that Respondent's discharge of Sanders violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Jurisdiction of the Board is properly asserted in this case.

2. By discharging its employee, Everett Sanders, for his conduct during the course of processing a grievance, and thereafter failing and refusing to reinstate him, Respondent has violated Section 8(a)(1) of the Act.

3. The conduct of Respondent found in 2 above is an unfair labor practice affecting commerce within the meaning of Section 8(a)(1), (2), (6), and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain conduct in violation of Section 8(a)(1) of the Act, by discharging its employee, Everett Sanders, which conduct interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed them by Section 7 of the Act, Respondent shall be ordered to cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes of the Act. Such affirmative action shall be to post the usual informational notice to employees attached hereto as "Appendix," and offer immediate and full reinstatement to its employee, Everett Sanders, to his former position or if that position is no longer available to a substantially equivalent one, without loss of seniority or other benefits, and to make him whole for any loss of earnings he may have sustained by reason of the unfair labor practice against him. All loss of earnings and other benefits shall be computed on a

quarterly basis in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹²

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, American Red Cross Blood Services Division, Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees for engaging in union or other protected concerted activity, and thereafter, failing and refusing to reinstate them.

(b) In the above or any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Atlanta, Georgia, copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Offer immediate and full reinstatement to its employee Everett Sanders to his former position or, if that position no longer exists, to a substantially equivalent position, without loss of seniority or other benefits and make him whole for any losses he may have sustained by reason of his unlawful discharge, with interest thereon as set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

¹² Under *New Horizons*, interest is computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 281 NLRB 651 (1977).

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."